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BEFORE THE FEDERAL MARITIME COMMISSION
WASHINGTON D.C.

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OFFICE OF THE SECRETARY
FEDERAL MARITIME COMMISSION

MINTO EXPLORATIONS LTD.

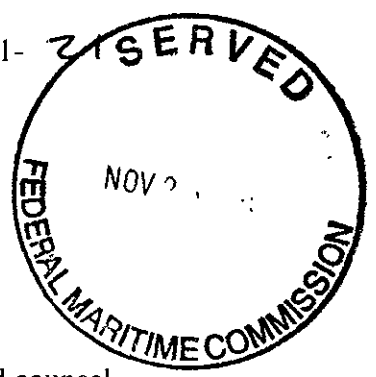
Complainant)

v.)

PACIFIC AND ARCTIC RAILWAY AND
NAVIGATION COMPANY)

Respondent)

Docket No. 11-



COMPLAINT

Complainant Minto Explorations Ltd. by and through its undersigned counsel hereby complains against Respondent Pacific and Arctic Railway and Navigation Company alleging violations of the Shipping Act of 1984 as amended and codified at 46 U.S.C. § 40101 et seq (the "Act"), and states in support thereof as follows:

PARTIES

1. Complainant Minto Explorations Ltd. ("Minto") is a Canadian corporation formed in British Columbia with its main business offices at 9th floor, 999 West Hastings Street, Vancouver, British Columbia. Minto owns and operates a high grade copper-gold-silver mine in the Yukon Territory. Minto is a wholly owned subsidiary of Capstone Mining Corp.

2. Minto ships copper concentrates (which have significant gold and silver credits) by water from Skagway, Alaska to Asia using common carrier vessels owned by Oldendorff Carriers GmbH & Co. that operate in the foreign commerce of the United States. Minto is a "shipper" within the meaning of 46 U.S.C. § 40102 (22) and Oldendorff is a "common carrier" within the meaning of 46 U.S.C. § 40102 (6).

3. Respondent Pacific and Arctic Railway Navigation Company (“PARN”) is an Alaska corporation with its main business offices at 231 Second Avenue, Skagway, Alaska. PARN is a wholly owned subsidiary of White Pass & Yukon, U.S., Inc. and its ultimate parent is ClubLink Enterprises Ltd., a Canadian corporation based in Toronto, Canada.

4. PARN, through subsidiaries, owns and operates three deepwater marine terminal facilities in Skagway, Alaska on land leased from the City of Skagway: an ore dock used by Minto, and the Broadway and Railroad docks used primarily by common carrier passenger vessels. PARN is a “marine terminal operator” within the meaning of 46 U.S.C. § 40102 (14), and has conceded it is such in related litigation between it and Minto.

JURISDICTION

5. The Commission has jurisdiction pursuant to 46 U.S.C. § 40301(a), which allows any person to file a sworn complaint with the Commission alleging a violation of the Act, except for 46 U.S.C. § 40307 (b)(1). The Complaint alleges that Respondent PARN, which is a marine terminal operator (“MTO”) subject to the Act, has violated provisions of the Act, other than 46 U.S.C. § 40307 (b)(1), by unreasonably prejudicing and disadvantaging Minto and unreasonably preferring and advantaging others in violation of 46 U.S.C. § 41106 (2), and by failing to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property, in violation of 46 U.S.C. § 41102 (c).

6. Minto asserted in the United States District Court for the District of Alaska that PARN’s dockage tariff, under which the vessels used by Minto pay a higher

per-foot dockage fee than other vessels, constituted unlawful discrimination under Alaska Stat. § 42.30.020. Minto's discrimination claim was referred to the Commission upon PARN's motion alleging that the dispute was within the Commission's primary jurisdiction. PARN asserted in the Alaska litigation that Minto's claim of discrimination is a Shipping Act claim and therefore within the statutory authority of the FMC and the court so held (over Minto's objection) in referring the claim to the Commission. The Alaska federal court did not dismiss Minto's state law discrimination claim, but rather stayed action on it pending its referral to the Commission. *See Attachment 1.*

7. At the direction of the court, Minto is presenting its state law discrimination claim to the Commission along with Shipping Act claims that PARN has conceded are within the Commission's jurisdiction. Minto does so without conceding that the state law claim is within the Commission's jurisdiction, and without waiving or prejudicing its ability to advance the state law claim in the Alaska federal court should the Commission decline to exercise jurisdiction over it.

FACTS COMMON TO ALL VIOLATIONS

8. In 1990, PARN sold a ship loader facility and ore storage terminal adjacent to its Skagway docks to the Alaska Industrial Development Export Authority ("AIDEA"). The Purchase Agreement provided that AIDEA and its users would be permitted to use PARN's dock upon payment of an all-inclusive dockage charge at PARN's current posted ore ship tariff rates.

9. In 2007, AIDEA and Minto entered into a user agreement for the ore storage and loading facilities AIDEA had purchased from PARN. As a user, Minto was

entitled to the benefit of PARN's agreement that it would allow use of PARN's dock for the all-inclusive dockage charge.

10. Despite its agreement to the contrary, PARN assessed Minto a wharfage charge, which Minto was forced to pay in order to move its ore. Indeed, PARN successfully persuaded the stevedores to refuse to assist Minto in allowing the vessels transporting copper concentrate to dock if Minto did not pay the wharfage charge, after Minto questioned PARN's contractual right to assess a wharfage charge. Minto was thus forced to pay the amounts under protest into escrow, and brought suit against PARN to enforce its contractual rights.

11. On August 12, 2011, the United States District Court for the District of Alaska ruled that PARN had breached its contractual obligations by charging Minto wharfage in addition to the dockage charge. The court termed PARN's position "preposterous."

12. While the dispute was pending, but prior to Minto filing its federal court complaint, it is undisputed that PARN's President advised Minto that he understood that PARN was unlikely to prevail in defending the wharfage fee in court, but that if PARN did not prevail it would simply raise its dockage fee tenfold to make up for the loss of its unlawful wharfage charge.

13. Even apart from PARN's threat to increase the dockage fee tenfold on the vessels used by Minto, those vessels already pay a higher per foot, per 24 hour period, dockage fee than do other vessels using PARN's terminal facilities.

14. Vessels transporting Minto's cargos pay a dockage, or "berthage," fee to PARN of \$4.00 per foot of overall vessel length per 24 hour period, as each is longer than

400 feet. Passenger vessels of similar length pay a berthage fee of only \$2.10 per foot of overall vessel length per 24 hour period. Barges pay a berthage fee of \$1.15 per foot of overall vessel length per 24 hour period during the first five days of their stay and \$0.95 of overall vessel length per 24 hour period for subsequent days.

15. Minto ultimately bears the cost of the berthage charges assessed against the vessels it uses through Minto's contractual relationship with the common carrier that transports its copper concentrates.

16. In an effort to justify its discrimination against ore vessels, PARN has asserted that when a vessel is using the ore dock no other vessel can berth at either the ore dock or the Broadway dock, and that the ore dock is inaccessible to other dock users. However, any cruise vessel has priority over an ore vessel and can bump it off the dock at any time if no other dock is available to it, and vessels, other than cruise vessels, have such priority on an emergency basis. The 1990 Agreement between AIDEA and PARN established this priority for cruise vessels, and, on an emergency basis, for other vessels.

17. There is no valid transportation factor that justifies the undue and unreasonable prejudices and disadvantages to Minto of its vessels having to pay higher berthage charges than others, or the undue and unreasonable preferences and advantages PARN correspondingly gives to other users of PARN's terminal facilities.

18. PARN has failed to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property by, among other things, charging ore vessels more than other vessels for berthage and threatening to increase the berthage charges tenfold in order to make up for the wharfage charges that it was unlawfully collecting.

VIOLATIONS

19. As a result of the foregoing, PARN has violated and continues to violate the Act, including 46 U.S.C. § 41102 (c), which requires MTO's such as PARN to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property, and 46 U.S.C. § 41106 (2), which prohibits MTO's such as PARN from imposing any undue or unreasonable prejudice and disadvantage on Minto or granting any undue or unreasonable preference or advantage to another. If the Commission asserts jurisdiction over the referred claim, PARN's actions also constitute unlawful discrimination under Alaska Stat. § 42.30.020.

20. By reason and as a direct result of PARN's aforementioned violations of the Act, Minto has sustained and continues to sustain injuries and damages, including the higher rates and costs it has been required to pay to PARN and the threat that it will not be able to move its ore if it does not pay unlawful and discriminatory charges. Minto has also been threatened with higher payments in retaliation for its successful assertion of its contractual rights. The exact amount of Minto's damage is in an amount to be proved at hearing.

PRAYER FOR RELIEF

WHEREFORE, Complainant Minto prays that PARN be ordered, after due hearing, to answer the charges herein, to cease and desist from the aforesaid violations of the Shipping Act, to establish and put in force such practices as the Commission determines to be lawful and reasonable, and to pay Minto reparations for PARN's violations of the Act, including the amount of the actual injury, plus interest, costs and

attorneys fees, and any other damages to be determined; and that the Commission order any such other relief as it determines proper.

PLACE OF HEARING

The Complainant requests that this matter be heard in Washington DC.

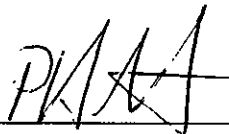
STATEMENT REGARDING ALTERNATIVE DISPUTE RESOLUTION

Minto has had settlement discussions with PARN both before and after the Court's ruling in the Alaska litigation, but PARN has not advanced an acceptable settlement proposal. As a result, and because filing of this Complaint was necessary in light of the Alaska court's referral of Minto's discrimination claim to the Commission, Minto did not invoke the Commission's informal dispute resolution procedures prior to filing the Complaint or consult with the Commission Dispute Resolution Specialist about utilizing alternative dispute resolution ADR under the Commission ADR program.

Respectfully submitted,

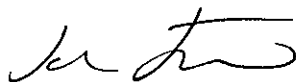
MINTO EXPLORATIONS LTD.

By:



Peter Hemstead

Vice President, Marketing and Treasurer
Capstone Mining Corp., parent of the Complainant
999 West Hastings Street, 9th floor
Vancouver, British Columbia



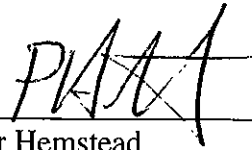
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Attorneys for Complainant Minto Explorations Ltd.

November 12, 2011

VERIFICATION

Peter Hemstead declares under penalty of perjury pursuant to 46 C.F.R. § 502.6 (c) that he is the Vice President, Marketing and Treasurer, of Capstone Mining Corp., parent company of the Complainant, that he has read and signed the foregoing complaint, and that the facts stated therein, upon his own knowledge and upon information received from others, he believes to be true.

A handwritten signature in black ink, appearing to read 'P. Hemstead', written over a horizontal line.

Peter Hemstead

**UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA**

MINTO EXPLORATIONS LTD.,)	
)	
Plaintiff,)	3:11-cv-00031 JWS
)	
vs.)	ORDER AND OPINION
)	
PACIFIC AND ARCTIC RAILWAY AND NAVIGATION COMPANY,)	[Re: Motion at Docket 11]
)	
Defendant.)	
_____)	

I. MOTION PRESENTED

At docket 11, defendant Pacific and Arctic Railway and Navigation Company ("PARN") moves pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss Count II of plaintiff's complaint for failure to state a claim upon which relief may be granted. In the alternative, defendant PARN moves to dismiss Count II on the grounds that the Federal Maritime Commission has primary jurisdiction over the claim. At docket 17, plaintiff Minto Explorations Ltd. ("Minto") opposes the motion. PARN replies at docket 23. Oral argument on the motion was heard on August 4, 2011.

II. BACKGROUND¹

Minto is a British Columbia corporation with its principal place of business in Yukon Territory, where it operates a copper ore mine. PARN is the owner and operator of a dock open to the public in Skagway, Alaska. Adjacent to the dock is a support for a ship loader facility, which is connected to an ore terminal. PARN is the prior owner of the ship loader facility and ore terminal. In July 1990, PARN sold the ship loader facility and ore terminal to Alaska Industrial Development and Export Authority ("AIDEA") through a purchase agreement ("Purchase Agreement").

Section 1.10 of the Purchase Agreement states in pertinent part:

1.10 Use of Dock:

- (a) Subject to (b) below, [PARN], in servicing AIDEA, its agents, or other users of the Purchased Assets, will use its best efforts to provide dockage to ore ships, at the Dock, in an expedient fashion and AIDEA, its agents and other users of the Purchased Assets will adhere to the rules and regulations relating to dockage of [PARN] and any regulatory authority having jurisdiction over the Dock.
- (b) AIDEA, its agents, or other users of the Purchased Assets will have the right for the Term to use the Dock for ore ships arriving to load outgoing free flowing bulk mine products that will be loaded from the Terminal and for the purposes normally granted to users of the Dock in consideration of payment of the dockage charge and for the purpose of tying and untying ore ships and operating, repairing and maintaining the ship loader and for all related activities...
- (c)
 - (i) Except as provided in (ii) below, for ore ships arriving to load outgoing free flowing bulk mine products that will be loaded from the Terminal, AIDEA will pay or cause to be paid to [PARN] an all inclusive dockage charge at the then current ore ship tariff rates of [PARN] as posted at Skagway, Alaska, or on file with the appropriate government regulatory agency.
 - (ii) For ore ships arriving to load Curragh's outgoing free flowing bulk mine products, AIDEA will pay or cause to be paid to [PARN] an all inclusive dockage charge of \$US 3.00 per foot per each period of 24 hours (with any partial periods

¹For purposes of this Rule 12(b)(6) motion, the court takes the factual allegations in plaintiff's complaint as true and construes them in the light most favorable to plaintiff.

considered a full 24 hours), plus (during the period October 1 to May 15 of each year) \$US 0.25 per foot per each period of 24 hours (with any partial periods considered a full 24 hours), each escalated on January 1 of each year by the increase since the preceding January 1 in the Consumer Price Index, all items Seattle, Washington, which shall be the only charge payable for use of the Dock for Curragh's outgoing free flowing bulk mine products.

In January 2007, AIDEA and Minto entered into a user agreement for the ore storage and loading facilities ("User Agreement"). Section 1(c) of the User Agreement states:

- c. Dock. All rights to use the Dock allowed under the Purchase Agreement, subject to AIDEA's right to allow Other Users to use the rights to use the Dock under the Purchase Agreement. To facilitate [Minto's] use of the Dock pursuant to the terms of the Purchase Agreement, AIDEA and [Minto] state that they intend [Minto] to be an "other user" under the provisions of paragraph 1.10 of the Purchase Agreement.

Minto pays AIDEA for use of the AIDEA owned facilities while loading and shipping copper concentrate.

On October 25, 2007, Minto shipped copper ore from Skagway with a vessel tied up to PARN's dock. After the shipment, PARN delivered an invoice to Minto with a wharfage charge. PARN's standard practice is to deliver an invoice to Minto for every shipment of copper ore from Skagway. To date, Minto has paid PARN \$117,617 in wharfage charges. Minto has not paid PARN for wharfage invoices in the total of \$64,473. Minto has deposited \$165,124.91 into an escrow account at First National Bank of Alaska, representing wharfage due on ore shipment beginning August 2009, and continues to deposit wharfage charges into the escrow account.

On March 4, 2011, Minto filed a complaint alleging three claims against PARN: 1) breach of contract; 2) discrimination in violation of AS 42.30.020; and 3) a request for a declaratory judgment that PARN cannot charge ships transporting ore for Minto a higher dockage fee or tariff than it charges other vessels, PARN's current dockage fee for ships transporting ore for Minto is unlawfully discriminatory under AS 42.30.020, and the

imposition of “an additional fee of wharfage without landing, loading or unloading its goods on the dock is unreasonable and a violation of AS 42.30.020.”²

III. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim made pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims in the complaint.³ In reviewing a Rule 12(b)(6) motion to dismiss, “[a]ll allegations of material fact in the complaint are taken as true and construed in the light most favorable to the nonmoving party.”⁴ “Conclusory allegations of law, however, are insufficient to defeat a motion to dismiss.”⁵ To avoid dismissal under Rule 12(b)(6), plaintiffs must aver in their complaint “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”⁶ “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”⁷ “[F]or a complaint to survive a motion to dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.”⁸

IV. DISCUSSION

As a preliminary matter, the court notes that both parties attached materials beyond the pleadings to their briefing. Rule 12(d) provides that if, on a motion under Rule 12(b)(6), “matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.” The

²Doc. 1 at p. 7.

³*De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978).

⁴*Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997).

⁵*Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

⁶*Al-Kidd v. Ashcroft*, 580 F.3d 949, 956 (9th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (internal citation omitted)).

⁷*Iqbal*, 129 S.Ct. at 1949.

⁸*Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

court declines to treat PARN's motion to dismiss as a motion for summary judgment and will not consider the materials outside the pleadings filed by the parties.

Count II of Minto's complaint alleges that PARN discriminates against Minto in violation of AS 42.30.020 by charging ships hired by Minto to ship ore concentrates a higher per foot dockage fee than other ships using PARN's dock and by charging Minto a wharfage fee in addition to a dockage fee. Alaska Statute 42.30.020 provides in pertinent part:

(a) Every person operating a public service plant or undertaking wholly or partially in a city for the furnishing of telephone service, water, power, lighterage, wharfage, dockage, storage, heat or light or kindred public service shall serve everybody alike without discrimination, and without denial, except for good and sufficient cause. Every person undertaking to supply this public service shall adopt reasonable rules and regulations for the conduct of the business and the operation of the public service plant. The rules and rates of charges for service shall be given fair and reasonable publicity.⁹

PARN moves to dismiss Count II of Minto's complaint on the grounds that it fails to state a prima facie claim of discrimination under AS 42.30.020 because Minto is the only ore ship using the dock and passenger ships are a different class of ship than ore ships. Alternatively, PARN moves to dismiss Count II because the Federal Maritime Commission ("FMC") has primary jurisdiction over the claim. The court addresses PARN's primary jurisdiction argument first.

PARN argues that the court should dismiss Count II because under the Shipping Act,¹⁰ the FMC has primary jurisdiction over tariff discrimination claims against marine terminal operators and PARN is a marine terminal operator as defined in 46 U.S.C. § 40102(14).¹¹ Minto contends that FMC does not have primary jurisdiction over Count II because Count II alleges a violation of a state statute, not a violation of the Shipping Act.

⁹AS 42.30.020(a)

¹⁰46 U.S.C. § 40101 *et seq.*

¹¹Doc. 11 at p. 6.

PARN replies that despite the fact that Count II alleges a discrimination claim under AS 42.30.020, the Shipping Act applies to Minto's discrimination claim and primary jurisdiction over the discrimination claim is properly vested in the FMC. The court concurs. The Shipping Act "provides for the comprehensive regulation of the shipping industry in the United States."¹² The FMC "is an independent regulatory agency of the United States charged with the administration and enforcement of the [Shipping] Act."¹³ The Shipping Act applies to a "shipper," which is defined as including "a cargo owner" and a "person for whose account the ocean transportation of cargo is provided."¹⁴ The Act also applies to a "marine terminal operator," which is defined as a "person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier..."¹⁵ A "common carrier" is defined as a person that "provide[s] transportation by water of passengers or cargo between the United States and a foreign country for compensation."¹⁶ Based on the above definitions, Minto is a shipper and a common carrier, and PARN is a marine terminal operator that provides dock facilities to common carriers.

The Shipping Act allows parties to enter into agreements and prohibits certain discriminatory acts. Pursuant to 46 U.S.C. § 41106, a marine terminal operator may not:

- (1) agree with another marine operator or with a common carrier to boycott, or unreasonably discriminate in the provision of terminal services to, a common carrier or ocean tramp;
- (2) give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person; or

¹²*Maritrend, Inc. v. The Galveston Wharves*, 152 F.R.D. 543, 548 (S.D. Texas, 1993).

¹³*F.M.C. v. Port of Seattle*, 521 F.2d 431 (9th Cir. 1975).

¹⁴46 U.S.C. § 40102(22).

¹⁵46 U.S.C. § 40102(14).

¹⁶46 U.S.C. § 40102(6).

(3) unreasonably refuse to deal or negotiate.¹⁷

Count II of Minto's complaint alleges that PARN has discriminated against Minto by charging its ships more for dockage and wharfage than the rate it charges for other ships using its dock. Taking the complaint's allegations as true as the court must for purposes of a Rule 12(b)(6) motion, § 41106 proscribes PARN's conduct.¹⁸ During oral argument, it became clear that Minto is the only ore shipper currently using the Dock and that Minto's discrimination claim is based on the fact that PARN charges a lower per foot length for passenger vessels over 400 feet than it does for ore ships over 400 feet in length. The parties did not cite any controlling authority as to whether a marine terminal operator may charge different types of vessels different dockage rates.

The doctrine of primary jurisdiction "relates to which tribunal, judicial or administrative, should first act."¹⁹ The doctrine, which expresses deference to administrative agencies and concern for conserving judicial resources, "is particularly appropriate where, as here, the contested issued may first be litigated through established agency procedures."²⁰ "Where there is a basis for judicial action, independent of agency proceedings, courts may route the threshold decision as to certain issues to the agency charged with primary responsibility for governmental supervision or control of the particular industry or activity involved."²¹

Four factors are uniformly present in cases where the court invokes the doctrine of primary jurisdiction: "(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory

¹⁷46 U.S.C. § 41106.

¹⁸*Maritrend*, 152 F.R.D. at 548.

¹⁹*Casey v. F.T.C.*, 578 F.2d 793, 798 n.8 (9th Cir. 1978).

²⁰*Id.* at 798.

²¹*U.S. v. General Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987) (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68 (1970)).

scheme that (4) requires expertise or uniformity in administration.”²² Consideration of those factors shows that the doctrine of primary jurisdiction should be applied here. Minto’s discrimination claim is governed by provisions of the Shipping Act, which provides a “comprehensive regulatory scheme for the shipping industry under the administration of the FMC.”²³ In addition, resolution of Minto’s tariff discrimination claim requires the FMC’s expertise, particularly with regard to whether a marine terminal operator may lawfully charge different rates for ore ships and passenger ships. Finally, Minto’s state law discrimination claim is based on the same facts and theory as one brought under the Shipping Act. “When a claim ‘both in the nature of the conduct complained of and the relief sought’ is one which could have been brought under the Shipping Act ..., the claim may first be properly submitted to the FMC.”²⁴

Minto contends that the court should not dismiss Count II because Minto’s complaint also seeks injunctive relief which the “FMC is not authorized to grant.” Having carefully reviewed Minto’s complaint, the court does not find a request for injunctive relief, but rather a request for a declaratory judgment that “PARN cannot charge ships transporting ore for Minto a higher dockage fee or tariff than what PARN charges other vessels for use of the dock,” “the current dockage fee or tariff imposed on ships transporting ore for Minto by PARN is unlawfully discriminatory,” and “the imposition of an additional fee of wharfage without landing, loading or unloading its goods on the dock is unreasonable and a violation of AS 42.30. 020.”²⁵ Moreover, to the extent Minto’s complaint can be construed as seeking injunctive relief, Minto’s argument is unavailing because 46 U.S.C. § 41306(a) provides that “[a]fter filing a complaint with the [FMC] under section 41301 of this title, the complainant may bring a civil action in a district court of the United States to enjoin conduct in violation of this part.”

²²*General Dynamics*, 828 F.2d at 1362.

²³*Maritrend*, 152 F.R.D. at 555.

²⁴*Id.* (quoting *A & E Pacific Construction Co. v. Saipan Stevedore Company, Inc.*, 888 F.2d 68, 72 n.6 (9th Cir. 1989)).

²⁵Doc. 1 at 7.

Because both parties to this suit are subject to the Shipping Act's provisions and PARN's conduct as alleged in Minto's complaint is proscribed by the Shipping Act, the court concludes that Minto's discrimination claim is subject to FMC's primary jurisdiction. Consequently, the court must determine whether to stay this action "or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice."²⁶ Here, Minto's complaint seeks damages for past conduct, as well as relief from continuing conduct. Because a damage action for past conduct is subject to the applicable statute of limitations and may be barred by the time the FMC acts, the court will stay this action instead of dismissing it.²⁷

V. CONCLUSION

For the reasons set out above, defendant's motion at docket 11 to dismiss Count II of plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) is **DENIED WITHOUT PREJUDICE** on the grounds that plaintiff's discrimination claim is subject to the primary jurisdiction of the FMC. Count II of plaintiff's complaint is **REFERRED** to the FMC for a determination on any and all issues within its jurisdiction. It is **FURTHER ORDERED** that this action is **STAYED** pending the outcome of the FMC's proceedings.

DATED at Anchorage, Alaska, this 12th day of August 2011.

/s/ JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

²⁶*Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993).

²⁷*Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 223 (1966).



WHITE PASS & YUKON ROUTE

THE SCENIC
RAILWAY OF THE WORLD

P.O. Box 435
Skagway, Alaska 99840
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wpyr.com

2011

TARIFFS:

- Pacific & Arctic Railway & Navigation Company
- Skagway Terminal Co.
- White Pass Properties

SKAGWAY PORT FEES

- Railway Dock
- Broadway Dock
- Ore Dock

Valid until December 31, 2011

BERTHAGE

PASSENGER VESSELS

Overall Length (feet)	Rate per each 24 hours or fraction thereof
0 - 300'	\$ 250.00
301 - 400'	\$ 500.00
Over 400'	\$ 2.10 per foot of overall length

VESSELS, GEAR, BULK

Less than 400'	\$ 2.80 per foot of overall length
400' or greater	\$ 4.00 per foot of overall length

BARGES

Length of Stay at Berth	Rate per each 24 hours or fraction thereof
0 - 5 days	\$ 1.15 per foot of overall length
6th and subsequent days	\$ 0.95 per foot of overall length

SERVICES

Water	\$ 4.84 per 1,000 gallons
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WHARFAGE

Wharfage is the charge assessed against the cargo passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter or water) when berthed at a wharf or when moored in a slip adjacent Wharf. Wharfage is solely the charge for use of the wharf and does not include charges for any other service.

Wharfage shall be for the account of the owner of the Cargo.

Wharfage shall be assessed on the basis of actual or dimensional weight.

All ore concentrates in
bulk or in containers /

packages / bags	\$ 2.00 per ton
Pipe 48" in diameter	\$ 2.00 per ton

PORT & SECURITY FEES

PASSENGER FEES

\$ 7.86 Port per passenger
\$ 0.65 Security Fee (Southeast Stevedoring)
\$ 8.51 TOTAL per passenger

**BEFORE THE FEDERAL MARITIME COMMISSION
WASHINGTON D.C.**

MINTO EXPLORATIONS LTD.

Complainant)

)

v.)

)

) **Docket No. 11- Z 1**

**PACIFIC AND ARCTIC RAILWAY AND
NAVIGATION COMPANY**)

Respondent)

)

**COMPLAINANT'S FIRST REQUEST FOR ADMISSIONS,
FIRST SET OF INTERROGATORIES, AND FIRST REQUEST FOR PRODUCTION
OF DOCUMENTS AND ELECTRONICALLY STORED INFORMATION TO
RESPONDENT PACIFIC AND ARCTIC RAILWAY AND NAVIGATION COMPANY**

Complainant Minto Explorations Ltd., through undersigned counsel, hereby serves its First Request for Admissions, First Set of Interrogatories, and First Request for Production of Documents to Respondent Pacific and Arctic Railway and Navigation Company ("PARN").

DEFINITIONS

1. "Complainant" or "Minto" means Minto Explorations Ltd. its parents, affiliates and subsidiaries, or anyone who acted or is acting in its behalf or at its direction, including any employee, agent, or attorney.

2. "Dockage," "dockage fee" or "berthage fee" means such fee as set out in the Port's tariff, defined as the charge assessed against a vessel for berthing at a wharf, pier, bulkhead structure or bank, or for mooring to a vessel so berthed.

3. "Document" means every type of recorded information prepared either prior to or subsequent to this request, including, but not limited to, any letter, intra-company communication, note, e-mail, print mail, memoranda, report, analysis, study, record, minutes of a

meeting, printed publication, article instruction, work assignment, notebook, draft, work sheet, drawing sketch, photograph, charge, advertisement, catalogue, brochure, news release, trade publication, invoice, and any other written, recorded, electronic, mechanical or electric form of representation of any kind, or graphic material however produced or reproduced and, in the absence of the original, a copy thereof, and any copy bearing markings thereon not present on the original or other copy thereof. All drafts, copies or preliminary materials that are different in any way from the executed or final document shall be considered to be additional documents as the term is used herein.

4 "Identify" or "Identity" means

(a) with respect to a person, to state to the best of your knowledge and belief: the full name, occupation, present or last known home or business address, home and business telephone number(s), and relationship to any party to these proceedings.

(b) with respect to a document, to state its name, author, date and current custodian.

5 "Person or entity" means any natural person or legal entity, including without limitation any corporation, partnership, limited liability company, union, proprietorship, trust, association, incorporated or unincorporated organization and any group of persons or entities.

6 "Relate to" or "relating to" a given subject means constitutes, contains, embodies, comprises, reflects, identifies, states, refers to, deals with, comments on, responds to, describes, analyzes or is in any way pertinent to that subject, including, without limitation, a document that concerns the transmittal of other documents.

6. "Respondent" or "PARN" means the Pacific & Arctic Railway and Navigation Company, its parents, affiliates and subsidiaries, including Skagway Terminal Company and

White Pass Properties, Inc., or anyone who acted or is acting in its behalf or at its direction, including any employee, agent, or attorney.

GENERAL INSTRUCTIONS

1. Service of responses and responsive documents shall be made at the offices of K&L Gates LLP, 1601 K Street N.W., Washington, D.C., 20006.

2. In answering these requests and interrogatories, please furnish all information available to you, including any information possessed by any agent, employee, or, unless privileged, attorney representing you in this case and any information or documents in your possession, custody or control.

3. Unless otherwise indicated, these Requests call for information from January 1, 2007 to the present.

4. Where appropriate, the masculine gender may be considered to be substituted for the feminine gender and vice versa, and the singular may be considered to be substituted for the plural and vice versa.

5. The past tense includes the present tense where the clear meaning is not distorted by the change of tenses.

6. All words used herein have the meaning ordinarily associated with their common usage unless otherwise noted in the text.

7. The words "and" and "or" shall be construed conjunctively or disjunctively as necessary to make any request inclusive rather than exclusive.

8. Documents and electronically stored information shall be produced as they are kept in the usual course of business, or shall be organized and labeled to correspond with the

categories in the request. Electronically stored information shall be produced in native format with all metadata produced.

9. If a requested document or electronically stored information is no longer in your possession, custody, or control, your response should state when the document or electronically stored information was most recently in your possession, custody or control, the disposition of the document or electronically stored information, and the identity of the person presently in possession, custody, or control of such document or electronically stored information. If the document or electronically stored information has been destroyed, state the reason for its destruction and the identity of the person who destroyed the document and the person who directed the documents to be destroyed.

10. In the event that any document or electronically stored information is withheld the basis of any claim of privilege or of attorney work-product, provide a log of the following information in writing as to each document or electronically stored information withheld:

- (a) The name and position of each author or contributor of the documents or electronically stored information;
- (b) The name and position of each addressee and recipient of the document or electronically stored information;
- (c) The date of the document or electronically stored information;
- (d) The subject matter of the document or electronically stored information; and
- (e) The grounds for the claim of privilege and/or work-product.

11. If it is not possible to answer a request or interrogatory, or any subpart thereof, in full after exercising due diligence to secure the information to do so or if an objection is made to any one or subpart, explicitly so state listing the reason for any objections. Answer every other request or interrogatory or subpart, and provide any information in your possession which may partially answer the request or interrogatory which you cannot answer in full.

12. These requests and interrogatories are continuing in nature, requiring that you file supplementary or additional answers if, subsequent to providing such answers, there are (a) any changed, different, or added fact, condition or circumstance which pertains or relates to any request or interrogatory herein or your answer thereto, or (b) you acquire any knowledge concerning additional witness or persons or entities which possess knowledge or information requested.

ADMISSIONS

Pursuant to Rule 207 of the Commission's Rules of Practice and Procedure, Complainant requests admission by Respondent PARN within thirty (30) days after the date of service of these requests, of the truth of the following matters for purposes of this action only:

1. Admit that PARN is a marine terminal operator as that term is defined in the Shipping Act of 1984, as amended.
2. Admit that the document attached hereto as Exhibit 1 is a true and correct copy of PARN's currently applicable marine terminal tariff at the Port of Skagway.
3. Admit that the term "berthage" used in PARN's tariff is equivalent to the term "dockage" used in prior PARN tariffs, for example, the Skagway Terminal Company terminal tariff effective June 1, 1994.

4. Admit that PARN's President stated to Minto that if PARN did not prevail in litigation concerning a wharfage fee that PARN was charging Minto, PARN would raise its dockage fee to compensate for the loss of the wharfage charge.

INTERROGATORIES

Pursuant to Rule 207 of the Commission's Rules of Practice and Procedure, Complainant requests that Respondent PARN answer separately and fully in writing, under oath, each of the following interrogatories within thirty (30) days after the date of service of their service:

1. For each request in Complainant's First Requests for Admissions which is not admitted in full without qualification:

(a) set forth in detail each reason why you deny the request in whole or in part, or have qualified your answer; and

(b) identify all documents that support your denial of the request in whole or in part or your qualification your answer.

2. Identify each instance in which a passenger vessel or other vessel has sought to dock at the Port but has been unable to do so because a bulk or ore vessel was using the ore dock, and for each such instance state how long the vessel was unable to dock and how the matter was resolved.

3. Separately identify each incident in which an ore vessel has caused any damage to PARN's docks and state the date of each incident, the name of each vessel responsible for such damage, the operator of each such vessel, the owner of each such vessel, the dollar amount of any such damage, the dollar amount, if any, that PARN expended to repair such damage, and whether PARN recovered the cost of repair of such damage from the owner or operator of the vessel separately from the payments of tariffs.

4. Separately identify each incident in which a bulk vessel has caused any damage to PARN's docks and state the date of each incident, the name of each vessel responsible for such damage, the operator of each such vessel, the owner of each such vessel, the dollar amount of any such damage, the dollar amount, if any, that PARN expended to repair such damage, and whether PARN recovered the cost of repair of such damage from the owner or operator of the vessel separately from the payments of tariffs.

5. Separately identify each incident in which an passenger vessel has caused any damage to PARN's docks and state the date of each incident, the name of each vessel responsible for such damage, the operator of each such vessel, the owner of each such vessel, the dollar amount of any such damage, the dollar amount, if any, that PARN expended to repair such damage, and whether PARN recovered the cost of repair of such damage from the owner or operator of the vessel separately from the payments of tariffs.

6. Separately identify each incident in which a barge has caused any damage to PARN's docks and state the date of each incident, the name of each vessel responsible for such damage, the operator of each such vessel, the owner of each such vessel, the dollar amount of any such damage, the dollar amount, if any, that PARN expended to repair such damage, and whether PARN recovered the cost of repair of such damage from the owner or operator of the vessel separately from the payments of tariffs.

7. Identify each service or facility that PARN provides to bulk and/or ore vessels calling at its docks and state the cost to PARN of providing each such service or facility.

8. Identify each service or facility that PARN provides to passenger vessels calling at its docks and state the cost to PARN of providing each such service or facility.

9. Identify each service or facility that PARN provides to barges calling at its docks and state the cost to PARN of providing each such service or facility.

10. State the total amount of fees PARN charged with respect to each vessel call at PARN's docks from January 1, 2007 to the present, breaking down for each call the berthage fee, dockage fee, wharfage fee, port and security charge, service charge, and any other charges paid by the vessel.

11. State the total amount that PARN expended with respect to each of its docks in each year from 2007 through 2011, including the basis on which any general expenditures were allocated to each dock.

12. State the date(s) on which each of the current amounts for "berthage" set out in the PARN tariff (i.e. \$250/\$500/\$2.10 per foot for passenger vessels, \$2.80/4.00 for bulk vessels, and \$1.15/0.95 for barges) were adopted.

13. Describe the methodology used to establish each of the current amounts for "berthage" set out in the attached PARN tariff, including the basis for the change from the prior applicable amounts.

14. State whether PARN attempts or has attempted to tie the amount of the berthage charges in its tariff to its expenditures and if so describe in detail its methodology for doing so, including all factors considered and all assumptions relied upon to establish PARN's expenditures.

15. State the date(s) on which each of the current amounts for "wharfage" set out in the PARN tariff (i.e. \$2/ton for ore concentrates and \$2/ton for pipe) were adopted.

16. Describe the methodology used to establish each of the current amounts for “wharfage” set out in the PARN tariff, including the basis for the change from the prior applicable amounts.

17. State whether PARN attempts or has attempted to tie the amount of the wharfage charges in its tariff to its expenditures and if so describe in detail its methodology for doing so including all factors considered and all assumptions relied upon to establish PARN’s expenditures.

18. State the date(s) on which each of the current amounts for port and security fees set out in the PARN tariff (i.e. 7.86/passenger and \$0.65/ passenger were adopted).

19. Describe the methodology used to establish each of the current amounts for port and security fees set out in the PARN tariff, including the basis for the change from the prior applicable amounts.

20. State whether PARN attempts or has attempted to tie the amount of the port and security fees in its tariff to its expenditures and if so describe in detail its methodology for doing so including all factors considered and all assumptions relied upon to establish PARN’s expenditures.

21. Identify each person who provided responses or information used in response to these Interrogatories or who otherwise assisted in their preparation.

22. Identify all persons with knowledge of any facts relevant to the issues in this proceeding.

23. Identify each witness you expect to submit testimony on PARN’s behalf in this proceeding and state the subject matter and the substance of the facts and opinions regarding which the witness is expected to testify.

24. Identify each expert witness you expect to submit testimony on your behalf in this proceeding and for each

(a) state the subject matter and the substance of the facts and opinions regarding which the witness is expected to testify

(b) identify the facts or data PARN's attorneys provided to that expert and all of the facts and data that the expert considered in forming the opinions to be expressed;

(c) identify the assumptions PARN's attorneys provided to that expert and the assumptions that the expert considered and the expert adopted in forming the opinions to be expressed

(d) state the compensation for the experts' study or testimony.

DOCUMENTS AND ELECTRONICALLY STORED INFORMATION

Pursuant to Rule 206 of the Commission's Rules of Practice and Procedure Complainant requests that PARN produce the following documents and electronically stored information for inspection and copying within thirty (30) days of service of this Request:

1. All documents PARN relied upon in responding to the requests for admissions or interrogatories.
2. All reports, summaries, or other documents prepared, reviewed, relied upon, or which may be reviewed or relied upon by any expert whom you expect to call to testify in this case.
3. All PARN tariffs in effect at the Port of Skagway from 1989 to present.
4. All documents relating to any communication with the Federal Maritime Commission concerning any PARN tariff in effect at the Port of Skagway, including any communication concerning the filing of such tariffs from 1989 to present.

5. All financial books and records that relate to the amount or receipt of tariff payments by each and every passenger vessel, bulk vessel, ore vessel, and barge by PARN.

6. All audited financial statements of PARN that include the Skagway terminal business.

7. All documents relating to the establishment of PARN's wharfage, berthage, dockage or port and security fees at the Port of Skagway. This request is not limited to documents created on or after January 1, 2007 but seeks all documents that relate to the establishment of the fees at their current levels.

8. All documents related to the expenses or costs incurred by PARN with respect to its docks at the Port of Skagway, including all projections, estimates, or calculations of such expenses or costs.

9. All documents relating to the inability of any vessel to dock at the Port, including the inability to do so because a bulk or ore vessel was using the ore dock

10. All documents relating to any damage that any vessel has caused to PARN's docks, including any documents related to insurance claims by PARN or claims against vessels or vessel owners for such damage.

11. All documents relating to any contemplated or proposed increase in PARN's wharfage, berthage, or port and security fees at the Port of Skagway, including but not limited to any contemplated or proposed increase in the berthage charge to vessel used by Minto to compensate for PARN's inability to charge Minto a wharfage fee.

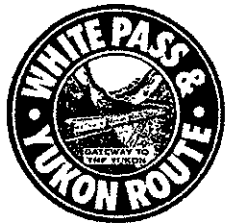
12. All documents relating to Minto, including all documents related to any dispute with Minto as to wharfage charges, or dockage or berthage charges.



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Attorneys for Complainant Minto Explorations Ltd.

November 18, 2011



WHITE PASS & YUKON ROUTE

THE SCENIC
RAILWAY OF THE WORLD

P.O. Box 435
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2011

TARIFFS:

- Pacific & Arctic Railway & Navigation Company
- Skagway Terminal Co.
- White Pass Properties

SKAGWAY PORT FEES

- Railway Dock
- Broadway Dock
- Ore Dock

Valid until December 31, 2011

BERTHAGE

PASSENGER VESSELS

Overall Length (feet)	Rate per each 24 hours or fraction thereof
0 - 300'	\$ 250.00
301 - 400'	\$ 500.00
Over 400'	\$ 2.10 per foot of overall length

VESSELS, GEAR, BULK

Less than 400'	\$ 2.80 per foot of overall length
400' or greater	\$ 4.00 per foot of overall length

BARGES

Length of Stay at Berth	Rate per each 24 hours or fraction thereof
0 - 5 days	\$ 1.15 per foot of overall length
6th and subsequent days	\$ 0.95 per foot of overall length

SERVICES

Water	\$ 4.84 per 1,000 gallons
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WHARFAGE

Wharfage is the charge assessed against the cargo passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter or water) when berthed at a wharf or when moored in a slip adjacent Wharf. Wharfage is solely the charge for use of the wharf and does not include charges for any other service.

Wharfage shall be for the account of the owner of the Cargo.

Wharfage shall be assessed on the basis of actual or dimensional weight.

All ore concentrates in
bulk or in containers /

packages / bags	\$ 2.00 per ton
Pipe 48" in diameter	\$ 2.00 per ton

PORT & SECURITY FEES

PASSENGER FEES

\$ 7.86	Port per passenger
\$ 0.65	Security Fee (Southeast Stevedoring)
\$ 8.51	TOTAL per passenger